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Statement of William H. Rehnquist,
Chief Justice of the United States
Before the National Commission on the Public Service
July 15, 2002

Judicial Compensation

Chairman Volcker and members of the National Commission on the Public Service, I appreciate the opportunity to appear here today on behalf of the men and women serving as federal judges across the country. I thank you on their behalf for the important work the Commission is performing.

I do not need to cite the statistics on falling judicial pay. We all know that the pay for federal judges, when adjusted for inflation, has fallen dramatically in the last 30 years, and we are all familiar with the spiraling compensation in the private practice of law. Nor do I need to recount the vastly increased workload faced by our federal judges. It is easy to make the case that judges' pay must be increased. The 2001 report by the American Bar Association and the Federal Bar Association, "Federal Judicial Pay Erosion - A Report on the Need for Reform," has done so. The June 14, 2002, letter from the Secretary of the Judicial Conference of the United States to this Commission demonstrates the inadequacy of judicial pay. Congress hears testimony about it virtually every year. My colleague, Justice Breyer, will today present a compelling case that our judges are not fairly paid.

Rather than focus on the fact of inadequate pay for the federal bench, I want to focus, first, on the effect of inadequate pay on the federal bench, and, second, on the need for a permanent solution to the periodic salary crises that continue to plague us.

Effect of Inadequate Pay

The framers of our Constitution came up with two major contributions to the art of government. The first was the idea of an executive not dependent on the political support of the legislature. The second was the idea of the judiciary independent of the executive and legislative branches. Many countries of western Europe have adopted new constitutions since World War II, and the countries of eastern Europe have followed suit after the Berlin Wall came down. The idea of a presidential, as opposed to a parliamentary, government, has not caught on with these countries. But the idea of an independent judiciary has. Every year American lawyers and judges go to these countries to help them establish such a system. The American judicial system is admired throughout the world.

Inadequate judicial pay undermines the strength of our judiciary.

Article III of the Constitution promises federal judges tenure during good behavior and "a Compensation, which shall not be diminished during their Continuance in Office." At the Constitutional Convention, the framers recognized the need for periodic increases in judicial salaries. They also recognized that the judiciary would require persons "of the first talents" and that to attract them the pay would have to be substantial.[1] The original draft of the compensation clause of Article III contained a prohibition on either decreasing or increasing the salary of a sitting judge, but the delegates recognized that freezing judges' salaries would seriously compromise the protections of life tenure. They agreed that Congress needed the ability "to increase salaries as circumstances might require . . . .[2]

Inadequate compensation seriously compromises the judicial independence fostered by life tenure. The prospect that low salaries might force judges to return to the private sector rather than stay on the bench risks affecting judicial performance -- instead of serving for life, those judges would serve the terms their finances would allow, and they would worry about what awaits them when they return to the private sector. John Adams warned in his 1776 pamphlet, "Thoughts on Government," that judges' "minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men."[3]

According to the Administrative Office of the United States Courts, more than 70 Article III judges left the bench between 1990 and May 2002 -- either under the retirement statute if eligible or simply resigning if not -- as did additional numbers of bankruptcy and magistrate judges. During the 1960s, only a handful of Article III judges retired or resigned. In January of this year alone, four federal judges announced that they would leave the bench, and two of them were not yet eligible to retire.

Although we cannot say that the judges who are leaving the bench are leaving only because of inadequate pay, many of them have noted that financial considerations are a big factor.[4] The fact that judges are leaving because of inadequate pay is underscored by the fact that most of the judges who have left the bench in the last ten years have entered private practice.[5] It is no wonder that judges are leaving when law clerks who join big law firms in large cities can earn more in their first year than district judges earn in a year.

Inadequate pay has other serious effects on the judiciary. Director Mecham's June 14 letter to you makes clear that judges who have been leaving the bench in the last several years believe they were treated unfairly. For example, a former district judge said: ". . . I couldn't feel secure about the future. We'd been assured we would receive cost-of-

living increases . . . . Then Congress said no to the promised COLAs." That sense of unfairness is not confined to those who have left the bench. A magistrate judge recounted the impact of Congress's failure to provide regular COLAs and noted, "Although I did not enter public service with any thought of becoming wealthy, I did enter with the hope that I would be treated fairly." That sense of inequity erodes the morale of our judges.

A career in federal judicial service has historically attracted excellent people, experienced in the life of the law, to resolve a constantly changing array of important disputes in the common law tradition. We do not want experienced judges to leave because they cannot afford to put their children through college or because their salaries are eaten away by inflation. Every time an experienced judge leaves the bench, the nation suffers a temporary loss in judicial productivity. It takes time for a new judge to gain the experience necessary to judge well and manage an ever-increasing docket efficiently. The judicial system benefits from the infusion of new judges required when judges leave after a lifetime of service. But our system cannot long tolerate the regular loss of experienced, seasoned judges that is now occurring.

Diminishing judicial salaries affects not only those who have become judges, but also the pool of those willing to be considered for a position on the federal bench. I am not suggesting that there is a shortage of lawyers lined up to apply for vacant judgeships. But many of the very best lawyers, those with a great deal of experience, are not willing to accept a job knowing that their salary will not even keep pace with inflation. Our judges will not continue to represent the diverse face of America if only the well-to-do or mediocre are willing to become judges. As the Commission on the Public Service formed in 1987 noted, if we cannot provide adequate pay, "recruitment risks becoming limited to the wealthy or the inexperienced." [6] Or, to paraphrase what George Mason said at the Constitutional Convention, the question will not be who is most fit to be chosen, but who is most willing to serve. We cannot afford a Judiciary made up primarily of the wealthy or the inexperienced.

I recognize that the salaries of federal judges are higher than those in many occupations, and that some may be skeptical of the need to raise the salaries of judges who already earn at least $150,000 per year. But it is not fair to compare judges' salaries to salaries in other occupations. Those lawyers who are most qualified to serve as federal judges have opportunities to earn far more in private law practice or business than as judges. I am not suggesting that we match the pay of the private sector -- but the large and growing disparity must be decreased if we hope to continue to provide our nation a capable and effective federal judicial system. Providing adequate compensation for judges is basic to attracting and retaining experienced, well-qualified and diverse men and women to perform a demanding position in the public service. We need judges from different backgrounds and we want them to stay for life.

There are different routes to becoming a district or circuit judge. Promotion through the ranks is one. District Court judges are appointed to the Courts of Appeals, magistrate judges and bankruptcy judges are appointed to the district courts. State court judges are appointed to federal courts. The salary factor is not a disincentive, because almost all of these judges earn less than district judges. But we do not want this route to be the only path to Article III judgeships. Promotion of people who are already on a public payroll should not be the only source of federal judges. The federal judiciary in the past has been able to attract experienced and able lawyers who have had extended and successful experience in the private sector. Their experience in that sector brings a perspective and an independence which is vital to the judiciary. But it is these potential candidates who are deterred by the current level of compensation. We cannot hope to come close to the amount they earn in private practice, but the appeal of public service makes up a good deal of the difference. But that appeal will not be enough at the present level of compensation.

Need for a Permanent Solution

I have spoken for many years about the need to compensate judges fairly. In 1989, in testimony before Congress, I described the inadequacy of judicial salaries as "the single greatest problem facing the Judicial Branch today." Eleven years later, in my 2000 Year-End Report on the Federal Judiciary, I said that the need to increase judicial salaries had again become the most pressing issue facing the judiciary. In the late 1980's, an earlier National Commission on the Public Service, also chaired by you, Mr. Volcker, documented the retention and recruitment problems for judges and other high level government officials caused by inadequate pay.[7] That Commission noted "an historic pattern of lengthy periods of stagnation and relative decline of the purchasing power" of judicial and other high level government salaries -- a decline of 35% from 1969 to 1988.[8] Yet here we are in 2002, still caught in the same box, continuing to use an arrangement for setting pay that simply ignores the need to raise pay until judicial and other high level government salaries are so skewed that, inevitably, a large (and politically unpopular) increase is necessary. This salary crunch also affects others in the public service by artificially compressing the salaries of those whose pay is tied to these higher salaries.

It is obvious that the current approach to judicial salaries does not work. The Commission on Executive, Legislative and Judicial Salaries (known as the "Quadrennial Commission") was devised in 1967 to solve this problem. Its members, all from the private sector, would recommend to the President appropriate salary changes for the Judiciary as well as the Congress and senior Executive Branch officers. 2 U.S.C. §§ 351, et seq. The President would take these recommendations into account in making his salary recommendations to Congress. Unless Congress acted to disapprove them within 30 days, the salary rates recommended by the President would be implemented.

Over the years, the Quadrennial Commission approach has produced varying results.[9] As the President noted in transmitting his 1989 salary recommendations to Congress, "[e]very one of the Commissions that has met over the past 20 years concluded that a pay increase for key Federal officials was necessary." [10] The President also noted that the 1989 Quadrennial Commission had "documented both the substantial erosion in the real level of Federal executive pay . . . since 1969 and the recruitment and retention problems that have resulted, especially for the Federal judiciary." [11] Because neither the Quadrennial Commissions' recommendations nor cost-of-living adjustments were regularly implemented, periodic crises in federal pay continued to arise.

The 1989 Quadrennial Commission's recommendation and the President's recommendation based upon it were not implemented, but they laid the groundwork for the enactment later that year of the Ethics Reform Act of 1989. It

provided a cost-of-living adjustment that year, followed by a pay raise the following year, for a total increase in judicial pay of nearly 35%. The Act also provided for yearly upward adjustments (automatic unless rejected by Congress for Members of Congress and Executive Branch officers, but requiring legislation for judges) based upon the Employment Cost Index. I hoped at the time that we had found a real way to ensure that judges' salaries at least would keep pace with inflation. Since 1993, however, there have been only four adjustments in the salaries of federal judges, resulting in an average annual cost-of-living adjustment of about one percent.

Although the judiciary appreciates any upward adjustment, these small and infrequent increases have once again allowed federal judicial salaries -- and salaries for many others in the public service -- to erode to an unacceptable level. The compensation of federal judges continues to lag far behind both inflation and the rising compensation of attorneys in private practice.

Oliver Ellsworth, after he resigned as Chief Justice of the United States in 1800 due to poor health, said, "Tho' our country pays badly, it is the only one in the world worth working for." [12] Those words still ring true today. Because these problems are long-standing, however, is not sufficient excuse to try simply to muddle through the current crisis and then go back to business as usual. I thank you for the work you have undertaken and sincerely hope you will devise, and the government will implement, a permanent solution.

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[1] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 429 (Max Farrand ed., 1911) (hereinafter Farrand).

[2] Farrand, at 44.

[3] Adams, "On Government," in C. Adams ed., 4 The Works of John Adams, 181, 198 (1851-56).

[4] See, e.g., "Insecure About their Future: Why Some Judges Leave the Bench," *The Third Branch*, Vol. 34, No. 2, February 2002.

[5] June 14, 2002, Statement of Leonidas Ralph Mecham, Secretary of the Judicial Conference of the United States, submitted to the National Commission on the Public Service, at p. 7; "Federal Judicial Pay Erosion - A Report on the Need for Reform," by The American Bar Association and the Federal Bar Association, February 2001, p. 15, n. 46.

[6] "Leadership for America: Rebuilding the Public Service," National Commission on the Public Service (1990), at 285, n. 1.

[7] Id.

[8] Id. at 274.

[9] See, 2000 Year-End Report on the Federal Judiciary.

[10] Cong. Rec., vol. 135, pt. 1, p. 251, Jan. 19, 1989.

[11] Id.

[12] Letter to Oliver Wolcott, October 16, 1800, in 2 Memoirs of the Administration of George Washington and John Adams, edited from the Papers of Oliver Wolcott 434 (George Gibbs, ed., 1849).